

ORIGINAL

No. 2010-0297

In the Supreme Court of Ohio

**APPEAL FROM THE
SUMMIT COUNTY COURT
OF APPEALS, NINTH APPELLATE
DISTRICT, CASE NO. 24783**

LONNA LOUDIN,

Plaintiff-Appellee,

v.

RADIOLOGY & IMAGING SERVICES, INC., et al.,

Defendants-Appellants.

**MERIT BRIEF OF DEFENDANTS-APPELLANTS, RICHARD D. PATTERSON, M.D.,
RADIOLOGY & IMAGING SERVICES, INC. AND RADIOLOGY & IMAGING
SERVICES, INC. DBA REFLECTIONS BREAST HEALTH CENTER**

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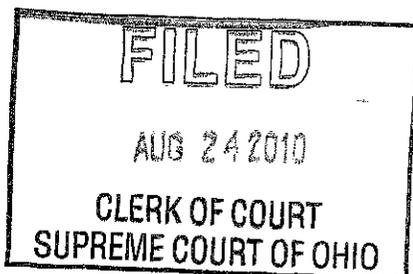


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STATEMENT OF FACTS¹

Plaintiff obtained screening mammograms at Reflections Breast Health Center from 1997 to May 4, 2004. All of Plaintiff's mammograms were interpreted as showing no evidence of malignancy from 1997 to 2003. In the Spring of 2004, Plaintiff reported to her OB/GYN that she felt a lump in one of her breasts. Plaintiff was referred to Reflections for a diagnostic mammogram. The diagnostic mammogram in May, 2004 contained findings suspicious for a malignancy, so she underwent a biopsy of left breast. Based upon the pathology findings from the biopsy, Plaintiff was diagnosed with Stage I breast cancer.

Subsequently, Plaintiff underwent a lumpectomy and node dissection to remove her cancer, chemotherapy and radiation treatments. Plaintiff also underwent a lymph node dissection, which determined that her cancer was Stage IIA. Since being diagnosed with breast cancer five years ago, Plaintiff has not experienced any recurrence or metastasis (spread) of her breast cancer.

Between Plaintiff's treating physicians and expert witness, Plaintiff was unable to prove that the alleged delay in diagnosis of her breast cancer proximately caused her harm or injury or that it affected her long-term prognosis. For example, there existed no evidence, whatsoever, that Plaintiff experienced any pain, discomfort or appreciation of her cancer that may have grown between 2003 and 2004. Additionally, Plaintiff's treating physicians, Dr. Koenig and Dr. Dellinger, both testified that Plaintiff's lymph node dissection would have been performed regardless of when her cancer was diagnosed. As such, Plaintiff endured the same pain and discomfort associated with the lymph node dissection had she been diagnosed earlier. Similarly,

¹For the most part, the medical facts are undisputed by the parties.

the evidence established that Plaintiff's surgery and chemotherapy and radiation treatment were identical to what she would have received with an earlier diagnosis.

With respect to Plaintiff's long-term prognosis as a result of the alleged delay in diagnosis of her cancer, referred to as "loss of chance," Plaintiff could not establish causation. Plaintiff's own medical expert, Dr. Citron, opined that had Plaintiff been diagnosed with breast cancer in 2003, her prognosis for surviving ten years would have been 85%. At the time of her diagnosis in 2004, Dr. Citron opined that her prognosis was 82%. (Tr. Doc 54.) This difference is not legally compensable under a "loss of chance" theory. Finally, there was no recurrence of Plaintiff's cancer. Plaintiff's evidence established that Plaintiff's care, treatment and prognosis were not adversely affected by the alleged delay in diagnosis.

On March 14, 2008, Plaintiff-Appellee Lonna Loudin ("Plaintiff") refiled this medical malpractice action against Defendants-Appellants Richard D. Patterson, M.D., Radiology & Imaging Services, Inc. and Radiology & Imaging Services, Inc. dba Reflections Breast Health Center ("Dr. Patterson"). Plaintiff's Complaint was premised upon Dr. Patterson's alleged failure to timely diagnose her breast cancer. Plaintiff's original Complaint contained **no** cause of action for negligent infliction of emotional distress. (Tr. Doc. 1.)

After discovery and depositions of Plaintiff's treating physicians and experts, it became apparent that Plaintiff was not going to be able to maintain her medical negligence action. For example, Plaintiff's treating physicians and her expert could not opine that any alleged delay in diagnosis of her breast cancer resulted in any different treatment had there been an earlier diagnosis. Additionally, with respect to Plaintiff's long-term prognosis, Plaintiff's expert opined that the alleged delay in diagnosis changed her ten-year survival rate from 85% to 82%, which is not compensable under Ohio's "loss of chance" law. Moreover, Plaintiff's current state of health

confirmed that the alleged delay in diagnosis did not cause her any injuries. Plaintiff's cancer was completely removed via lumpectomy and a node dissection and since then, there has been no recurrence of cancer. Finally, and most importantly, Plaintiff could not establish that during the alleged delay in diagnosis of her cancer that she ever experienced and/or appreciated any physical harm or injury as a result of the growth of her cancer. (Tr. Doc. 54.)

After it became evident that Plaintiff was not going to be able to prove the requisite element of proximate cause in her medical negligence case, in a last ditch effort to salvage any type of case against Dr. Patterson, on February 19, 2009, Plaintiff moved the Trial Court for leave to file an Amended Complaint in order to add a claim for negligent infliction of emotional distress. Plaintiff indicated that she was pursuing a negligent infliction of emotional distress claim by alleging a "fear of an increased risk of recurrence of cancer" as additional damages. (Tr. Doc. 30.) On March 4, 2009, Dr. Patterson filed a Motion to Dismiss Plaintiff's Amended Complaint for failure to state a claim. (Tr. Doc. 35.)

On April 16, 2009, the Trial Court issued an Order converting Dr. Patterson's Motion to Dismiss to a Motion for Summary Judgment. (Tr. Doc. 59.) On May 8, 2009, the Trial Court issued its Judgment Entry granting summary judgment in favor of Dr. Patterson on both Plaintiff's negligent infliction of emotional distress and medical malpractice claims. In doing so, the Trial Court issued a thirteen page decision that provided a very well-reasoned and factually/legally sound opinion. (Tr. Doc. 60.)

With respect to Plaintiff's negligent infliction of emotional distress claim, the Trial Court's analysis included an in-depth review "of the history and evolution of the claim of negligent infliction of emotional distress in Ohio and the development of its scope and limitations." Based upon a detailed analysis and application of Ohio law, the Trial Court granted

summary judgment in favor of Dr. Patterson on Plaintiff's negligent infliction of emotional distress claim. The Trial Court found that Plaintiff could not prove that she experienced or appreciated any physical injury or harm. Thus, there existed no compensable injuries or damages upon which Plaintiff could recover. As to Plaintiff's medical malpractice action, the Trial Court properly determined that there existed no genuine issue of material facts with respect to Plaintiff's two alternative theories of direct causation and "loss of chance." (*Id.*)

Plaintiff timely appealed to the Ninth District Court of Appeals. (App. Doc. 1.) On December 31, 2009, the Ninth District released its Decision and Journal Entry reversing the Trial Court's Order granting summary judgment in favor of Dr. Patterson. (App. Doc. 17; Appx. 4-29.) In its decision, the Ninth District erroneously created a new cause of action for negligent infliction of emotional distress never recognized or sanctioned by this Court. The Ninth District's decision essentially allows for a negligent infliction of emotional distress claim in a delay in diagnosis of cancer case, despite the fact that the alleged delay did not cause harm or physical injury and did not change Plaintiff's treatment or long-term prognosis. As the Ninth District's decision now stands, a plaintiff can automatically maintain a negligent infliction of emotional distress claim in every case involving an alleged delay in diagnosis of cancer even if the alleged delay did not cause a plaintiff to experience or appreciate any harm or physical injuries. (*Id.*)

On January 11, 2010, Dr. Patterson filed a Motion to Certify a Conflict between the Ninth District's decision and the Second District Court of Appeals' decision in *McGarry v. Horlacher*, 149 Ohio App. 3d 33, 775 N.E. 2d 865, 2002-Ohio-3161. (App. Doc. 11.) The basis for requesting that the Ninth District certify a conflict was that in *McGarry*, the Second District held that there existed no independent claim for negligent infliction of emotional distress merely

because an alleged delay in diagnosis of cancer caused some progression of the plaintiff's cancer. Clearly, the *McGarry* decision is in direct conflict with the Ninth District's decision. (*Id.*)

On February 4, 2010, the Ninth District denied Dr. Patterson's Motion to Certify a Conflict. (App. Doc. 21; Appx. 30-31.) One Judge from the Ninth District dissented from the Journal Entry denying Dr. Patterson's Motion to Certify a Conflict. Of importance, the underlying basis for The Ninth District denying Dr. Patterson's Motion to Certify a Conflict was an erroneous application of Ohio law with respect to "loss of chance." The Ninth District held:

The issue the defendants have proposed for certification does not represent a conflict between the two cited cases. Ms. Loudin presented expert testimony **specifically quantifying the adverse effect that the alleged delay in diagnosis had on her prognosis.**

(Appx. p. 31.)

The adverse effect that the Ninth District was referring to was Plaintiff's expert's opinion that the alleged delay in diagnosis caused a decrease in Plaintiff's survival rate from 85% to 82%. However, this difference is not legally recognized as a compensable injury under this Court's "loss of chance" decision in *Roberts v. Ohio Permanente Medical Group, Inc.* (1990) 76 Ohio St. 3d 483, 668 N.E. 2d 480. As such, the premise upon which the Ninth District based its refusal to certify a conflict between its decision and the *McGarry* decision is, likewise, legally flawed.

This Court now has the opportunity to provide all Ohio Appellate Courts and Trial Courts with clarification on determining the appropriateness of a negligent infliction of emotional distress cause of action. This Court should reverse to address the Ninth District's erroneous creation of a new negligent infliction of emotional distress claim not previously recognized or sanctioned by this Court.

ARGUMENT

PROPOSITION OF LAW NO. 1: The Ninth District's Decision Has Impermissibly Created A New Infliction Of Emotional Distress Cause Of Action That Is Not Recognized Or Sanctioned By This Court's Precedents And That Is In Direct Conflict With The Second District Court Of Appeals' Decision In *McGarry*.

At the outset, it must be noted that in this Court's landmark negligent infliction of emotional distress case of *Heiner v. Moretuzzo* (1995), 72 Ohio St. 3d 80, 652 N.E. 2d 664, 1995-Ohio-65, this Court explicitly recognized that although a plaintiff's distress may be legitimate, "not every wrong is deserving of a legal remedy." *Id.* at 88. This Court in *Heiner* stated that "[w]hile we remain vigilant in our efforts to ensure an individual's 'right to emotional tranquility,' we decline to expand the law to permit recovery on the facts of this case." *Id.* at 88.

The instant case is exactly the type of case this Court recognized that "not every wrong is deserving of a legal remedy." However, the Ninth District ignored this Court's guidance in order to allow a negligent infliction of emotional distress claim for Plaintiff that is both unprecedented and not legally justified. Although Plaintiff undoubtedly experienced emotional distress attributable to her ultimate diagnosis of cancer, the Ninth District erroneously created a new cause of action for negligent infliction of emotional distress for what is apparently Plaintiff's "phantom" harm/injury associated with the growth of her cancer between 2003 and 2004. Without any evidence of any direct proximate cause or "loss of chance" in support of her underlying medical negligence case and no evidence, at all, that Plaintiff experienced or appreciated any harm or physical injury during the alleged delay in diagnosis, the Ninth District erroneously allowed for an independent claim for negligent infliction of emotional distress.

The Trial Court correctly addressed this issue "head-on" with an in-depth analysis of Ohio's law on negligent infliction of emotional distress. The Trial Court recognized that the

controlling authority in medical malpractice cases involving the alleged delay in the diagnosis of cancer and fear of recurrence of cancer was set forth by the Second District in *McGarry, supra*.

The facts in this case are analogous to those in the *McGarry* case. Like this case, *McGarry* involved an allegation of a defendant's failure to diagnose cancer that proximately caused emotional injuries, including fear of impending death and diminished life expectancy. In *McGarry*, the Second District specifically rejected Plaintiff's attempt to recover for emotional damages allegedly caused by a delay in diagnosis of cancer. The Second District concluded that the facts of the case did not support a cause of action for negligent infliction of emotional distress where the "Plaintiff's life had not been put in peril by an external force nor had she witnessed an accident or event putting the life of a close friend or loved one in peril, the only situations the Supreme Court has recognized such a cause of action." *Id.* at 46, *citing Heiner, supra*. The *McGarry* Court reasoned that "even if cancer could be characterized as an external force, [the defendant doctor] had not caused the cancer, and that treating the alleged misdiagnosis of the cancer as an external force was an untenable stretch of the definition of negligent infliction of emotional distress." *Id.* Thus, the Court declined to extend the applicability of a claim for negligent infliction of emotional distress to cases in which there was an alleged delay in the diagnosis of cancer.

Likewise, Plaintiff in this case was claiming emotional distress as a result of Dr. Patterson not timely diagnosing her breast cancer, but she could not prove any actual physical harm, that she required any different treatment or there was a change in her prognosis. Ohio law does not recognize this form of negligent infliction of emotional distress as Plaintiff did not appreciate any injury, pain or discomfort at the time Dr. Patterson was alleged to have been negligent. *See, also, Heiner, supra*. Additionally, Plaintiff received the same treatment had

there been an earlier diagnosis and her long term prognosis remained unchanged. Therefore, Plaintiff's negligent infliction of emotional distress claim failed as a matter of law.

Clearly, the Trial Court properly applied the *McGarry* decision to this case in granting summary judgment in favor of Dr. Patterson on Plaintiff's negligent infliction of emotional distress claim. However, the Ninth District completely misapplied the *McGarry* decision and effectively created a conflict of law between these negligent infliction of emotional distress cases.

The Ninth District improperly allowed Plaintiff's claim for negligent infliction of emotional distress as a result of a purported contemporaneous physical injury that simply did not exist and was not appreciated by Plaintiff. In support of that holding, the Ninth District improperly concluded that Plaintiff made a claim for negligent infliction of emotional distress on the basis that she suffered a contemporaneous physical injury, the alleged growth of the cancer, which caused her emotional distress. However, the Ninth District's reasoning is fatally flawed in light of the fact that growth of cancer does not automatically constitute a compensable *physical injury*.

The Ninth District recognized that there is no support under Ohio law for the finding that growth of cancer automatically constitutes a physical injury or is a basis for a negligent infliction of emotional distress claim. Because no legal support exists for this finding, the Ninth District relied exclusively upon uncontrolling law from other jurisdictions. *See Alexander v. Scheid* (Ind. 2000), 726 N.E. 2d 272; *Boryla v. Pash* (Colo. 1998), 960 P.2d 123; *Bond v. Ivanjack* (D.C. App. 1999), 740 A.2d 968. However, these out-of-state cases did not automatically create a negligent infliction of emotional distress claim due to alleged delay in diagnosis of cancer. Simply put,

these cases did not hold that tumor growth during the alleged delay in diagnosis equated to a physical injury.

However, Plaintiff in this case did not suffer any physical injuries as a result of her alleged tumor growth and metastasis. For instance, although Plaintiff claimed that she suffered unnecessary pain as a result of the lymph node dissection, there was no evidence to support that the lymph node dissection was a result of the alleged delay in diagnosis. Plaintiff baselessly argued that, absent the alleged delay in diagnosis, she would not have had to endure the lymph node dissection or the accompanying “pain, discomfort, limitation of motion and scar tissue.” But, Plaintiff’s own experts established that Plaintiff needed the same lymph node dissection despite the alleged delay in diagnosis.

Moreover, Plaintiff presented no evidence that during the period of time that the cancer grew during the alleged delay in diagnosis that she ever experienced any pain, discomfort or harm. In other words, Plaintiff had no physical appreciation of the fact that her cancer was growing. It is illogical for the Ninth District to conclude that Plaintiff can maintain a negligent infliction of emotional distress claim in the total absence of any appreciation of physical injury or harm. Essentially, the Ninth District has created a new cause of action in the absence of any harm.

Plaintiff could not prove any proximate cause as a result of the alleged delay in diagnosis – her surgery was identical; her chemotherapy and radiation treatment was identical; and she has had no recurrence of cancer. The Ninth District basically allowed Plaintiff to substitute a negligent infliction of emotional distress claim for her medical negligence case because Plaintiff was unable to prove her underlying case. However, there is absolutely no support under Ohio law for the Ninth District to extend a negligent infliction of emotional distress claim to this case.

The Ninth District erroneously created a “fallback” negligent infliction of emotional distress claim where Plaintiff could not prove either direct proximate cause or a “loss of chance” theory. Cf. *Haney v. Barringer*, Seventh Dist. App. No. 06 MA 252, 2007-Ohio-7214.

Moreover, the Ninth District’s reliance on cases from other jurisdictions is completely unconvincing. Not only is that law not controlling on this Court and distinguishable from Ohio law, it does not even support the finding that tumor growth and metastasis automatically constitutes a *physical injury*. Although tumor growth and metastasis may exist, this alone is inadequate to maintain a cause of action for negligent infliction of emotional distress under Ohio law, which requires an appreciation of some physical injury or harm. The Trial Court correctly granted summary judgment, but the Ninth District erred in reversing it by creating a completely new and unrecognized cause of action for negligent infliction of emotional distress.

The Ninth District’s decision in this case has impermissibly created a new cause of action for negligent infliction of emotional distress claim that is not recognized or sanctioned by this Court or any other Appellate Court throughout the State of Ohio. The Ninth District’s allowance of a negligent infliction of emotional distress claim in the absence of any evidence that Plaintiff appreciated or was aware of any alleged injury or harm effectively creates a new class of negligent emotional distress claims without any limitations, whatsoever. The Ninth District’s apparent desire to allow a negligent infliction of emotional distress claim for Plaintiff in this case does not justify bending settled principles of law to allow a negligent infliction of emotional distress cause of action that is unprecedented and not legally justified. In fact, this Court in *Heiner* explicitly recognized that there exists no “subspecies” for the tort of negligent infliction of emotional distress in the context of the physician-patient relationship. *Heiner, supra* at 87-88.

Despite the Trial Court's in-depth analysis of the law and its well-reasoned Opinion, the Ninth District erroneously reversed the Trial Court and allowed for a claim of negligent infliction of emotional distress based upon an unfounded conclusion that the alleged delay in diagnosis of Plaintiff's cancer automatically caused Plaintiff physical harm when, in fact, it did not. There may be circumstances where a delay in diagnosis of cancer that caused some growth of a tumor which went completely unnoticed by the Plaintiff and did not adversely affect the ultimate outcome. Yet, the Ninth District decision improperly allows cause of action for a physical injury and emotional distress that simply did not exist while the cancer allegedly grew.

Clearly, a plaintiff cannot maintain an independent cause of action for negligent infliction of emotional distress when the plaintiff did not appreciate any contemporaneous physical injury or harm. In *Burris v. Grange Mut. Inc.* (1989) 46 Ohio St. 3d 84, 545 N.E. 2d 83, this Court refused to allow a negligent infliction of emotional distress action where the plaintiff allegedly suffered physical injuries as a result of being informed of her son's death but where she never sensorially perceived the incident. Similarly, in *Dobran v. Franciscan Med Ctr.*, 102 Ohio St. 3d 54, 806 N.E. 2d 537, 2004-Ohio-1883, this Court denied recovery for negligent infliction of emotional distress where the medical care provider negligently destroyed lymph node samples because fear of metastasis of cancer is not a basis for such a claim.

By allowing a "fallback" negligent infliction of emotional distress claim in the face of a total lack of evidence/testimony on an actual appreciation of a physical injury or proximate cause, the Ninth District has effectively redefined this Court's precedents with respect to a negligent infliction of emotional distress claim. The prejudicial effect of the Ninth District's decision is that defendants in medical malpractice actions will be required to defend themselves against negligent infliction of emotional distress in all delay in diagnosis of cancer cases even

though a plaintiff cannot prove he/she experienced any physical injury or harm in the underlying medical malpractice case. If Plaintiffs are unable to prove a medical negligence action, they should not be permitted to pursue a “fall-back” independent negligent infliction of emotional distress claim that is simply not recognized in Ohio.

Additionally, the Ninth District’s erroneous decision and legally flawed reasoning is further evidenced in its Journal Entry denying Dr. Patterson’s Motion to Certify a Conflict with the Second District’s decision in *McGarry*. In refusing to certify a conflict, the Ninth District based its decision on the fact that “Ms. Loudin presented expert testimony specifically quantifying the adverse effect that the alleged delay in diagnosis had on her prognosis.” (Appx. p. 31.) This finding by the Ninth District is in direct conflict with this Court’s decision in *Roberts, supra* with respect to a “loss of chance” claim.

Apparently, the Ninth District determined that Plaintiff is permitted to pursue a negligent infliction of emotional distress cause of action because she presented evidence that the alleged delay in diagnosis caused a quantifiable adverse effect on her prognosis, *i.e.*, an 85% chance of survivability reduced to an 82% chance. However, this “adverse effect” is not a legally compensable injury under this Court’s holding in *Roberts*. In *Roberts*, this Court adopted a “loss of chance” theory of recovery whereby a plaintiff can recover for a less-than-even change of recovery or survival resulting from medical negligence. To sustain a claim for loss of chance, a plaintiff is required to present expert testimony showing that the defendant’s negligence increased the risk of harm to a plaintiff. *Id.* The “loss of chance” theory only applies when a patient who is already afflicted with a disease or disorder has a “less than probable chance (less than 50%) of recovery at the time of the alleged malpractice; a plaintiff may not as a matter of law recover under a “loss of chance” theory if there is a 50% or greater chance of survival at the

time of the alleged malpractice.” *Id.* at 485; *McDermott v. Tweel*, 151 Ohio App. 3d 763, 768 N.E. 2d 67, 2003-Ohio-885 at ¶ 41; *Haney, supra*.

Under the *Roberts* decision, a reduction from 85% to 82% chance of survivability is not legally compensable as Plaintiff’s prognoses at the time of the alleged negligence and at the time of diagnosis were both greater than 50%. Clearly, in refusing to certify a conflict between its decision and the *McGarry* decision, the Ninth District’s reasoning is wholly inconsistent with this Court’s precedent in *Roberts*. Consequently, there is now a holding by the Ninth District that completely redefines the “loss of chance” law as set forth by this Court.

CONCLUSION

The Ninth District’s decision was not only erroneous and in conflict with this Court’s precedents and the Second District, it goes far beyond common sense with respect to creating a new “fallback” negligent infliction of emotional distress cause of action. It is illogical to conclude that a plaintiff who did not appreciate that a tumor was growing and did not cause any physical harm or injury would be able to maintain an independent claim for negligent infliction of emotional distress. The Ninth District’s decision effectively creates a new cause of action for negligent infliction of emotional distress never recognized or sanctioned by this Court. Under the Ninth District’s decision, there now exists legal authority creating a new cause of action for negligent infliction of emotional distress in the absence of any contemporaneous physical injury or appreciation of any physical injury or harm and where the alleged negligence did not adversely affect the ultimate outcome. Now, when a plaintiff cannot prove a *prima facie case* of medical negligence, the Ninth District has erroneously allowed for a non-existent negligent infliction of emotional distress claim. Additionally, the Ninth District has ignored this Court’s precedent with respect to a “loss of chance” theory and has effectively redefined such a claim.

The Ninth District's decision has effectively increased medical malpractice liability where Plaintiffs cannot prove a *prima facie* case of medical negligence under the Ninth District's erroneous decision. Medical care providers now face an expansion of potential liability under unwarranted negligent infliction of emotional distress claims. It is fundamentally unfair to place such a burden upon medical care providers.

This Court should resolve the conflict created by the Ninth District and provide Ohio Courts with the proper guidance needed with respect to a negligent infliction of emotional distress claim and loss of chance theory. As such, Dr. Patterson requests that this Court reverse the Ninth District's decision and reinstate the Trial Court's Summary Judgment Order that was properly entered in his favor.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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10-0207

No.

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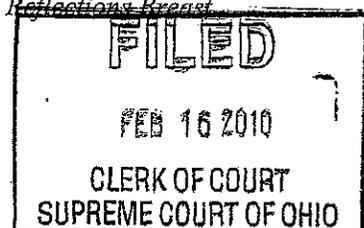
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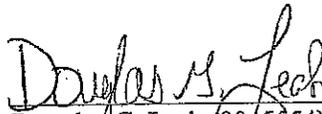


Notice of Appeal of Defendants-Appellants
Richard D. Patterson, M.D., Radiology & Imaging Services, Inc. and Radiology & Imaging Services, Inc. dba Reflections Breast Health Center

Defendants-Appellants Richard D. Patterson, M.D., Radiology & Imaging Services, Inc. and Radiology & Imaging Services, Inc. dba Reflections Breast Health Center hereby gives notice of appeal to the Supreme Court of Ohio from the decision rendered by the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 24783 on December 31, 2009.

This case is one of public and great general interest that warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,



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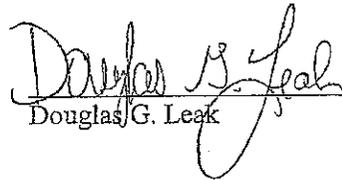
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COPY

STATE OF OHIO)
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COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. LICHTENBERG
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2009 DEC 31 AM 7:51

LONNA LOUDIN

SUMMIT COUNTY, OHIO 24783
CLERK OF COURTS

Appellant

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APPEAL FROM JUDGMENT
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COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2008 03 2197

Appellees

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} After Lonna Loudin found out that the lump she discovered in her breast had been visible on a mammogram that was taken 13 months before she was diagnosed with breast cancer, she sued the radiologist who had interpreted the mammogram, Richard Patterson, M.D., and his employer, Radiology and Imaging Services Inc. Ms. Loudin alleged claims of negligent infliction of emotional distress, medical malpractice, respondeat superior, and negligent supervision. The trial court granted summary judgment to the defendants on Ms. Loudin's claim of negligent infliction of emotional distress because it determined that Dr. Patterson's alleged negligence was not the cause of Ms. Loudin's cancer. It granted summary judgment to them on her medical malpractice claim because it determined that there was no genuine issue of material fact remaining regarding proximate cause under either the loss of chance or strict causation theories. Based on its decision regarding the medical malpractice claim, the trial court also

granted Radiology and Imaging Services summary judgment on the remaining two claims. This Court reverses and remands because there is a genuine issue of material fact regarding each element of Ms. Loudin's claims for medical malpractice and negligent infliction of emotional distress. As this Court has reversed the decision of the trial court regarding the medical malpractice claim, the trial court's decision regarding the negligent supervision and respondeat superior claims must also be reversed. Ms. Loudin has also appealed the trial court's exclusion of certain testimony from her expert radiologist. This Court affirms the trial court's ruling on that issue.

FACTS

{¶2} Ms. Loudin has been concerned about the early detection and treatment of cancer, at least since she saw her husband die of lung cancer in the early 1980s. In order to protect herself against breast cancer, she conducted self breast examinations and submitted to annual screening mammograms at Reflections Breast Health Center, which is owned and operated by Radiology and Imaging Services.

{¶3} In April 2003, Ms. Loudin had a screening mammogram completed, which Dr. Patterson interpreted as normal. The following spring, when she felt a lump high in the outer part of her left breast, Ms. Loudin consulted her gynecologist, who referred her for a diagnostic mammogram. On May 21, 2004, Ms. Loudin submitted to another mammogram through Radiology and Imaging Services. This time, the technician used a small metal marker to highlight the area of her breast where she reported feeling a lump. According to the radiology report, the 2004 films revealed "a 1.5 cm mass with a spiculated margin in the left breast" that appeared "highly suggestive of malignancy." Dr. Patterson admitted that, in retrospect, the same mass appears on several earlier mammogram films, including those from 2003. Without

conceding that he violated the standard of care, Dr. Patterson agreed that Ms. Loudin had breast cancer in April 2003 when he interpreted her mammogram as normal.

{¶4} In early June 2004, Ms. Loudin underwent a biopsy and lumpectomy. In her affidavit, she said that her oncologist told her that he had removed a two-centimeter mass that was a well-differentiated, Stage I breast cancer, and she would not require radiation treatment. The subsequent pathology report of the tumor, however, indicated that the cancer was “[i]nvasive carcinoma extending to margin.”

{¶5} In early July, Ms. Loudin underwent additional surgery to check for signs that the cancer had spread to her lymph nodes. Following the surgery, tests revealed that the cancer had spread to two lymph nodes, which negatively affected her diagnosis. Doctors informed Ms. Loudin that, rather than Stage I, her disease was actually Stage IIA, based on the involvement of lymph nodes. Ms. Loudin’s surgeon acknowledged that, based on early findings, he initially believed her cancer was localized, but he testified by deposition that he does not engage in the staging of cancer. Ms. Loudin’s oncologist denied having told her anything about her diagnosis until after the final pathology report was complete.

{¶6} Ms. Loudin first completed eight rounds of chemotherapy followed by radiation treatments five days a week for six weeks. After that, she began a hormonal drug therapy that is expected to last for five years. As of October 2005, when Ms. Loudin was deposed, she had not had any recurrence of cancer and no additional treatment was on the horizon, other than the continued hormonal drug therapy. There is no evidence in the record to indicate that Ms. Loudin’s status has changed since that time.

{¶7} Ms. Loudin’s expert radiologist, Jules Sumkin, D.O., explained in deposition that doctors generally advise women to have yearly mammograms after a certain age because

screening has led to earlier detection of breast cancer, which has improved patient survival. He further explained that, when interpreting mammograms, a doctor should compare the current films with past films to look for changes over time, especially asymmetric changes and masses with irregular or spiculated edges. Dr. Sumkin testified that Dr. Patterson deviated from the acceptable standard of care by failing to flag the mass in Ms. Loudin's left breast while interpreting her April 2003 mammogram. According to him, the standard of care required the radiologist to note the mass, suggest the possibility of malignancy, and request additional radiographs for further evaluation.

{¶8} Dr. Sumkin testified that, in retrospect, Ms. Loudin's mass was visible as far back as the 1999 films. He further testified that it was not a deviation from the standard of care to fail to flag the mass before 2003, however, because it was "virtually invisible" on the earlier films. He also testified that, although still "a challenging case" in 2003, by then, the finding was more pronounced and should have been caught. As he explained it, the 2003 films show a lighter area with "little radiating lines coming out of it." He said that the asymmetric area "looks like a nodule or mass, [with] . . . an irregular margin." This is "a potential problem" that required the doctor to compare the films with prior studies to assess the likelihood that the density might be malignant. He testified that the prior films, going back to 1999, indicate that a mass was present in the same area and was growing larger over time, eventually tripling in size between 1999 and 2004, when it was diagnosed. When asked if the lesion he saw on the film was cancerous in April 2003, Dr. Sumkin answered that "it was a malignant appearing lesion and it was most likely cancer, which it turned out to be." Dr. Patterson testified that, when he interpreted the 2003 films, he compared them to Ms. Loudin's 2002 and 1999 studies, but he did not notice anything suspicious.

{¶9} Dr. Patterson's colleague who interpreted Ms. Loudin's 2004 mammogram testified that the mass "was so clearly malignant" by that time that he did not need to order further tests. He said that there was so much spiculation, which he described as a starburst appearance to the mass, that he rated it a five on a scale of zero to five, with five being the most suspicious for malignancy.

{¶10} Based on Dr. Sumkin's reading of the mammograms, Ms. Loudin's expert oncologist, Ronald Citron, M.D., testified by deposition that Ms. Loudin's cancer grew from one centimeter in April 2003 to two centimeters by the time it was removed in 2004. In his opinion, to a reasonable degree of medical probability, had the cancer been caught in April 2003, the lymph nodes would not have been involved. He explained that it was the involvement of her lymph nodes that stepped up her cancer from Stage I to Stage IIA.

{¶11} Dr. Citron generally described the progressive nature of cancer. He explained that, in addition to the spread of cancer beyond the site of the original tumor, the tumor burden will also increase with time. Dr. Citron described the tumor burden as the number of cancer cells in the body. He explained that while the tumor is untreated, it will continue to grow and add cells. "[C]ancer is a progressive disease . . . as time goes on, if the patient is not treated, there will be more cancer cells in the body, more to kill [when treatment begins]."

{¶12} Dr. Citron described four main factors that affect survivability and treatment decisions and expressed the opinion that, for Ms. Loudin, two of the four factors had undergone adverse changes during the period between her 2003 and 2004 mammograms. That is, in Dr. Citron's opinion, Ms. Loudin's tumor had grown and the cancer had spread to her lymph nodes during the period of delay. The oncologist who is treating Ms. Loudin testified that he believes "that there's a 60 to 70 percent chance that she will never have the cancer come back and that

she will be cured of this disease . . . [a]nd vice versa then would be a 30 to 40 percent chance that the disease will show up somewhere else and she will not survive.” He said that, at least as of the time that he was deposed, Ms. Loudin had no distant metastatic sites. Dr. Citron quoted more optimistic survivability rates. According to Dr. Citron, more recent medical literature indicates that, given the advancements in cancer treatments, Ms. Loudin has an 82 percent chance that the cancer will not come back to kill her.

{¶13} Dr. Citron testified that he believed that, as a result of the delay in diagnosis, Ms. Loudin’s long-term prognosis had been downgraded from an 85 percent chance of survival to an 82 percent chance. He explained that, once the primary tumor has been removed and patients are being treated with other therapies, such as chemotherapy and radiation, there is nothing for doctors to measure in order to determine whether the therapies are working. Doctors and patients must simply wait for time to pass in order to determine whether the patient is in the 54 percent of people who will respond to the treatment.

{¶14} Dr. Patterson and his employer presented expert testimony opposing most of the opinions expressed by Drs. Sumkin and Citron. According to their evidence, Dr. Patterson did not violate the standard of care and, if the cancer had been caught in 2003, it would not have changed Ms. Loudin’s diagnosis, course of treatment, or outcome. As this is an appeal from an entry of summary judgment against Ms. Loudin, however, this Court must view the facts in the light most favorable to her.

PROCEDURAL BACKGROUND

{¶15} After largely completing discovery, Ms. Loudin voluntarily dismissed her claims. Months after refiled the case, she obtained leave of court to amend her complaint, and Dr. Patterson and his employer responded by moving to dismiss the amended complaint for failure to

state a claim upon which relief could be granted. The trial court issued a briefing schedule for a response to the motion and a reply. The parties each supported their arguments with evidence acceptable under Rule 56(C) of the Ohio Rules of Civil Procedure, and the trial court converted the motion to one for summary judgment. Ms. Loudin has appealed the trial court's decision granting Dr. Patterson and his employer summary judgment on all claims.

{¶16} Ms. Loudin alleged medical malpractice "leading to the increase in the size of Plaintiff's tumor, metastasis to the lymph nodes and emotional distress, including fear of an increased risk of recurrence of cancer." She further alleged that, as a direct and proximate result of the negligent diagnosis, she "has experienced and continues to experience pain, suffering, mental anguish and emotional distress as a result of the loss of chance of a better outcome, including fear of an increased risk of recurrence of cancer." In her affidavit, Ms. Loudin testified that "[she is] severely distressed by [the] delay in diagnosis, which [she] fear[s] has increased [her] risk for reoccurrence of cancer and possibly death and [she has] suffered additional physical injury, including, but not limited to, depression, fatigue, and physical illness and . . . [an inability] to adequately perform [her] job responsibilities" Although Ms. Loudin did not plead a separate claim for relief for negligent infliction of emotional distress, the trial court noted that the parties had agreed that Ms. Loudin had asserted a separate cause of action for negligent infliction of emotional distress. The parties have not suggested to this Court that Ms. Loudin's claim for negligent infliction of emotional distress was not properly before the trial court.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

{¶17} Ms. Loudin has argued that the trial court incorrectly granted summary judgment against her on her claim for negligent infliction of emotional distress because she provided evidence of a contemporaneous physical injury; that is, the increase in the size of her tumor and

the cancer's metastasis to her lymph nodes. She testified that she suffered severe emotional distress as a result of the delay in diagnosis that subjected her to an increased risk of metastasis of cancer and even death. She has argued that the growth of the tumor and its spread to her lymph nodes during the period of delay in diagnosis were contemporaneous physical injuries that put her case into a different light than those requiring severe and debilitating emotional distress. Dr. Patterson and his employer have argued that Ohio law does not permit a plaintiff to maintain a claim for negligent infliction of emotional distress for an alleged delay in diagnosis of cancer.

{¶18} Originally, Ohio law would not permit a claim of negligent infliction of emotional distress unless it was accompanied by a contemporaneous physical injury. In *Miller v. Baltimore & Ohio Southwestern Railroad Company*, 78 Ohio St. 309 (1908), overruled by *Schultz v. Barberton Glass Company*, 4 Ohio St. 3d 131 (1983), the Ohio Supreme Court considered the claims of a woman who suffered property damage and great shock when she saw a train run off the tracks, through her fence, and into the side of her house. *Id.* at 315. The plaintiff claimed \$500 worth of property damage and \$3,000 in injuries due to the "severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health." *Id.* at 316. She did not allege that she suffered any physical injury in the incident.

{¶19} The Supreme Court noted that "the right to recover for [purely psychological] injuries . . . has been almost universally denied" and held, based on public policy and a lack of foreseeability, that the railroad was not liable for the plaintiff's psychological injuries, regardless of their subsequent physical manifestations. *Miller v. Baltimore & Ohio Sw. R.R. Co.*, 78 Ohio St. 309, 316, 326 (1908), overruled by *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131 (1983). The Court held that "[n]o liability exists for acts of negligence causing mere fright or shock,

unaccompanied by contemporaneous physical injury, even though subsequent illness results, where the negligent acts complained of are neither willful nor malicious." *Id.* at paragraph three of the syllabus.

{¶20} In *Miller*, the Court discussed various concerns it had with allowing compensation for psychological claims in the absence of any physical injury. The Court expressed concern that such cases "would naturally result in a flood of litigation" involving "easily feigned" injuries. *Miller v. Baltimore & Ohio Sw. R.R. Co.*, 78 Ohio St. 309, 321 (1908), overruled by *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131 (1983). The Court believed the difficulty juries had with deciding whether claimed physical injuries were real would be "greatly increased" with psychological claims and that "a wide field would be opened for fictitious or speculative claims." *Id.* In an effort to compensate psychological injury while requiring some form of corroboration, the Court held that a contemporaneous physical injury was a prerequisite to assertion of a claim for negligent infliction of emotional distress. *Id.* at paragraph three of the syllabus.

{¶21} In 1983, the Ohio Supreme Court reconsidered its stance on purely psychological injuries. In *Schultz v. Barberton Glass Company*, 4 Ohio St. 3d 131, 132 (1983), the Court considered whether to allow recovery for a driver who managed to avoid sustaining a physical injury on the highway after a large sheet of glass fell off the truck in front of him and smashed into his car, shattering the windshield. The driver alleged that he was permanently injured and required continued care for his psychological injuries. After a jury awarded him \$50,000, this Court reversed and remanded for a determination of whether the plaintiff had suffered a contemporaneous physical injury that would allow him to pursue a claim for negligent infliction of emotional distress. *Id.*

{¶22} The Ohio Supreme Court reversed, holding that “[a] cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury.” *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, syllabus (1983) (overruling *Miller v. Baltimore & Ohio Sw. R.R. Co.*, 78 Ohio St. 309 (1908), and its progeny). The Court determined that the reasons it had given in *Miller* for demanding a physical injury as a prerequisite to such claims were no longer valid. *Id.* at 133. It noted that, although some states, like Ohio, had chosen to limit emotional distress claims by requiring a contemporaneous physical injury while others had chosen to require a physical impact of some type, the justifications for the two doctrines are similar. *Id.* at 133 n.2. Therefore, the Court considered them together as compared to states that had no rule requiring a physical injury or impact as a prerequisite to a claim for negligent infliction of emotional distress. *Id.* at 133. It determined that there was no indication that states that “do not require an impact as a basis for recovery” had experienced an excessive number of emotional distress claims. *Id.* (quoting *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965)). It further determined that, even if dropping the prerequisite could lead to a flood of litigation, that “is an unacceptable reason for denying justice.” *Id.*

{¶23} The Court further considered the fear of fictitious psychological injuries and fraudulent claims it had expressed in *Miller* and recognized that “[t]he danger of illusory claims for mental distress is no greater than in cases of physical injury, especially when the injury is slight.” *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 134 (1983). It concluded that evidentiary requirements would provide a sufficient safeguard against fictitious claims. *Id.* Finally, it considered whether problems regarding the proof of emotional distress were insurmountable due to being based on speculation or conjecture and dismissed that concern

because “[j]udges and juries will consider the credibility of witnesses and the genuineness of the proof as they do in other cases.” *Id.* at 134-35.

{¶24} The Court noted that “[l]egal scholars who have considered the rule denying recovery in the absence of a contemporaneous physical injury or impact are unanimous in condemning it as unjust and contrary to experience.” *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 135 (1983). It wrote that, “[h]aving carefully examined the arguments in support of the contemporaneous physical injury rule, it is clear that continued adherence to the rule makes little sense” and overruled the earlier cases upholding the doctrine. *Id.* The Court recognized that “those injured by the negligent infliction of serious emotional distress should have the opportunity to recover damages” even if they suffered no contemporaneous physical injury. *Id.* at 136. Thus, the Ohio Supreme Court eliminated the contemporaneous physical injury rule and explained why physical impact and physical injury rules are unnecessary. *Id.* at 135. In doing so, it did not adopt a rule requiring a subsequent physical manifestation of the emotional distress in order to validate the claim. See *id.* at 139 (Holmes, J., dissenting).

{¶25} The Court later, however, set a higher evidentiary bar for claims of emotional distress unaccompanied by physical injury. In *Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983), it “sought to limit liability by defining legal standards and evidentiary guidelines to ensure that the purported [emotional] injury has indeed been suffered.” *Binns v. Fredendall*, 32 Ohio St. 3d 244, 245 (1987). In *Paugh*, the Court permitted a mother’s claim for negligent infliction of serious emotional distress caused by three motorists. *Paugh*, 6 Ohio St. 3d at 74. Within eight months, one of the motorists had wrecked her car onto the Paughs’ property and the other two had wrecked into the Paughs’ house. The mother claimed that witnessing the crashes in the area where her children often played caused her great psychological harm, despite the fact that her

children had not been injured. She alleged no physical injuries to herself either, but sought recovery for spells of fainting and hyperventilation, medication, and a brief admission to a psychiatric ward. The Court held that, "[if] a bystander to an accident states a cause of action for negligent infliction of serious emotional distress, the emotional injuries sustained must be found to be both serious and reasonably foreseeable, in order to allow a recovery." *Id.* at paragraph three of the syllabus. According to the Court in *Paugh*, "serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Id.* at paragraph 3a of the syllabus. The Court set forth factors to be considered in order to determine whether such an injury was reasonably foreseeable. *Id.* at paragraph 3b of the syllabus. But it rejected any requirement that a bystander who does not suffer a contemporaneous physical injury must prove a physical manifestation of the emotional distress in order to support a negligent infliction of emotional distress claim. *Id.* at paragraph two of the syllabus.

{¶26} In the 1987 case of *Binns v. Fredendall*, 32 Ohio St. 3d 244 (1987), the Ohio Supreme Court held that, if a plaintiff also suffers contemporaneous physical injury, she does not need to prove that her resulting psychological injuries are severe and debilitating. *Id.* at paragraph one of the syllabus. In *Binns*, the plaintiff and her live-in boyfriend were involved in a car crash. The plaintiff received minor physical injuries, but suffered serious psychological injuries as a result of remaining in the car after the crash with her boyfriend, who had received gruesome head injuries that caused his death. The Supreme Court determined that it is not necessary for a plaintiff who suffers at least minor physical injuries to present evidence that her psychological distress is severe and debilitating. *Id.* at 245. The Court noted that "plaintiff's physical injuries take her outside the class of *Schultz* and *Paugh* plaintiffs who suffer purely

emotional or psychiatric injury.” *Id.* at 246. “As such, the emotional or psychiatric injuries which have arisen as a proximate result of the defendant’s tortious act are compensable under the traditional rule for recovery.” *Id.* “The tortfeasor takes his victim as he finds him, the effect of his tortious act upon the person being the measure of damages.” *Id.* Thus, the plaintiff in *Binns* did not need to prove to a court, as a matter of law, that her emotional distress was more than mere upset or hurt feelings before proving to a jury that it reached the level of serious or debilitating. *Id.* at 245 n.1; see also *Heiner v. Moretuzzo*, 73 Ohio St. 3d 80, 84 (1995) (explaining that in *Binns*, the Court held that “the test we announced in *Paugh v. Hanks* . . . for the recovery of damages for emotional and psychiatric injuries” does not apply to a person who has also suffered contemporaneous physical injury) (quoting *Binns*, 32 Ohio St. 3d at 245).

CONTEMPORANEOUS PHYSICAL INJURY

{¶27} In this case, Dr. Patterson and his employer have argued that Ms. Loudin cannot maintain her claim for negligent infliction of emotional distress because she did not suffer a contemporaneous physical injury and has not offered proof of severe and debilitating psychological distress. Ms. Loudin has argued that her evidence of physical injury consists of expert testimony that her tumor doubled in size during the period of delay and the cancer was permitted to spread into her lymph nodes. She has cited the Indiana Supreme Court’s case of *Alexander v. Scheid*, 726 N.E.2d 272, 284 (Ind. 2000), for the proposition that “the destruction of healthy lung tissue by a cancerous tumor” caused by a delayed diagnosis of lung cancer is a sufficient physical impact, under the modified impact rule, to satisfy the requirements for a negligent infliction of emotional distress claim. The Indiana Supreme Court explained that “the purpose of the rule is to confine recovery to those with ‘direct involvement’ in the defendant’s negligent act or omission.” *Id.* (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind.

1991)). Ms. Loudin has also cited the Colorado Supreme Court's decision in *Boryla v. Pash*, 960 P.2d 123, 129 (Colo. 1998), for the idea that "[i]n cases where the plaintiff demonstrates that her cancerous condition physically worsened as a result of the delayed diagnosis, [she] has demonstrated a sufficient physical injury to permit the recovery of emotional distress damages."

{¶28} Dr. Patterson and his employer have argued that the growth and metastasis of cancer are not contemporaneous physical injuries in this case. They have also argued that, although some states have held that growth and or metastasis of cancer is a physical impact, that does not equate to the physical injury required in Ohio. It is true that the term "physical injury," as used in Ohio, and the term "physical impact," as used in other states, have different meanings. This Court is only concerned with the contemporaneous physical injury rule followed in Ohio.

{¶29} Ohio originally adopted the contemporaneous physical injury rule in *Miller* to exclude all negligent infliction of emotional distress claims that were not pleaded in conjunction with a physical injury stemming from the same negligent conduct. *Miller v. Baltimore & Ohio Sw. R.R. Co.*, 78 Ohio St. 309, paragraph three of the syllabus (1908), overruled by *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131 (1983). The rule was intended to offer some measure of protection against frivolous claims for emotional distress by requiring some more objective indicia of genuineness. Today in Ohio, however, a plaintiff may recover on a claim for a purely emotional injury unaccompanied by any physical impact or physical injury. *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, syllabus (1983). In *Paugh*, the Ohio Supreme Court extended the law to cover a mere bystander to the peril, but it required that the emotional distress be "severe and debilitating" to a reasonable person. *Paugh v. Hanks*, 6 Ohio St. 3d 72, paragraph 3a of the syllabus (1983). The Court later held that a plaintiff may recover on a claim for negligent infliction of an emotional injury that does not meet the high evidentiary standard announced in

Paugh, provided the plaintiff was directly involved in the negligent incident. *Binns v. Fredendall*, 32 Ohio St. 3d 244, 246 (1987) (allowing plaintiff's claim for emotional injuries under the "traditional rule for recovery," requiring the tortfeasor to take his victim as he finds him, due to plaintiff's minor physical injuries).

{¶30} Thus, after *Binns*, a plaintiff may bring a claim for negligent infliction of emotional distress without meeting the "severe and debilitating" *Paugh* standard, provided the plaintiff also suffered a contemporaneous physical injury. The physical injury, no matter how minor, provides some measure of proof that the plaintiff was actually exposed to the peril and was not a mere bystander. Black's Law Dictionary has equated "physical injury" with "bodily injury," which it has defined as "[p]hysical damage to a person's body." Black's Law Dictionary 801 (8th ed. 2004). Today, the contemporaneous physical injury rule requires a plaintiff to prove that the defendant's breach of duty caused her body physical damage as opposed to proving subsequent physical manifestations of emotional distress. If the plaintiff meets that requirement in a negligent infliction of emotional distress claim, she is not subject to the "severe and debilitating" emotional distress standard announced in *Paugh*.

{¶31} According to expert testimony that must be viewed in a light most favorable to Ms. Loudin at this stage of the proceedings, reasonable minds could find that Dr. Patterson's deviation from the standard of care proximately caused Ms. Loudin to suffer a significant increase in the size of a malignant breast tumor and allowed the cancer to spread beyond the site of the original tumor and into her lymph nodes. Thus, each day that the cancer remained undiagnosed and untreated caused further damage to Ms. Loudin's body. Under the circumstances, the growth and metastasis of cancer are contemporaneous physical injuries that

may support a claim for negligent infliction of emotional distress that is not severe and debilitating. *Binns v. Fredendall*, 32 Ohio St. 3d 244, 245 (1987).

IS FEAR OF CANCER COMPENSABLE IN OHIO?

{¶32} Ms. Loudin has claimed that Dr. Patterson's negligence subjected her to serious emotional distress due to fear that her cancer will recur and, perhaps, kill her. The parties disagree regarding whether a fear of metastatic cancer is a compensable injury in Ohio. Dr. Patterson and his employer have cited *Dobran v. Franciscan Medical Center*, 102 Ohio St. 3d 54, 2004-Ohio-1883, at ¶1, for the proposition that fear of metastasis of cancer cannot, under any circumstances, serve as the basis of a claim for negligent infliction of emotional distress.

{¶33} In *Dobran*, the plaintiff had a mole excised that turned out to be a malignant melanoma. *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 2004-Ohio-1883, at ¶2. After a sentinel lymph node biopsy, traditional testing revealed that his lymph nodes were negative for metastasis of cancer. Nevertheless, the plaintiff decided to send the remaining lymph node specimen to California for additional testing as part of a cutting-edge clinical study. Allegedly due to the defendant's negligence, the specimen thawed before reaching the California lab, precluding further testing. The plaintiff alleged that the special testing "would have defined the probability of metastasis and his life expectancy, and that his quality of life [was] negatively affected by the extreme emotional distress caused by the uncertainty surrounding a recurrence of cancer." *Id.* at ¶6. In barring the claim, the Court relied on the fact that "Mr. Dobran did not contract cancer as a result of [the defendant's] allegedly negligent actions [and] [i]n the event that his cancer ever returns, it will not be because [the defendant] placed him in any immediate risk of physical harm." *Id.* at ¶18.

{¶34} Considering the history of negligent infliction of emotional distress claims in Ohio, the Supreme Court distinguished the facts of *Dobran* from negligent exposure to illness cases like *Padney v. MetroHealth Medical Center*, 145 Ohio App. 3d 759 (2001), and likened them to non-existent peril cases like *Heiner v. Moretuzzo*, 73 Ohio St. 3d 80 (1995). In *Heiner*, the Supreme Court refused to allow a negligent infliction of emotional distress claim because the plaintiff neither witnessed a harmful incident nor was she ever subjected to any actual physical danger. *Heiner*, 73 Ohio St. 3d at 85. In *Heiner*, the plaintiff was incorrectly and repeatedly told by health care professionals that she had tested positive for HIV. The Court disallowed the claim because, despite the plaintiff's genuine and significant emotional distress, she had never been exposed to HIV and was HIV negative. *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 2004-Ohio-1883, at ¶12. Thus, the alleged negligence of the medical professionals, no matter how frightening, did not subject her, or anyone else, to any real physical peril. *Id.* (citing *Heiner*, 73 Ohio St. 3d at 85). The Court concluded by noting that the facts of *Heiner* and *Dobran* "remind us that not every wrong is deserving of a legal remedy." *Id.* at ¶19 (quoting *Heiner*, 73 Ohio St. 3d at 88).

{¶35} *Dobran* is distinguishable from this case because, in *Dobran*, there was no aggravation of cancer caused by a delay in diagnosis and treatment and Mr. Dobran suffered no physical injury caused by the alleged negligence. Mr. Dobran sought emotional distress damages for "the uncertainty surrounding a recurrence of cancer," but the defendants had not increased his risk of recurrence or negatively affected his disease process in any way. *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 2004-Ohio-1883, at ¶6. As the Supreme Court pointed out, the defendants neither caused the cancer nor subjected Mr. Dobran to an increased risk of metastasis. *Id.* at ¶18. The defendants allegedly precluded the plaintiff from obtaining an

extra modicum of security offered by experimental technology, but, unlike Ms. Loudin's situation, the defendants' actions in *Dobran* did not allow the cancer to grow or metastasize before treatment, and did not in any way affect Mr. Dobran's chance to survive the illness.

{¶36} Dr. Patterson and his employer have also cited the Second District Court of Appeals decision in *McGarry v. Horlacher, M.D.*, 149 Ohio App. 3d 33, 2002-Ohio-3161, for the proposition that the trial court correctly rejected Ms. Loudin's effort to recover for emotional damages allegedly caused by a delay in diagnosis of cancer. In *McGarry*, the plaintiff suffered a five-month delay while her doctor treated a suspected fibroid before he made a proper diagnosis of the cancerous tumor in her uterus. By the time it was properly diagnosed, the cancer was in Stage III, which meant it had spread beyond the uterus and cervix. The Second District agreed with the trial court's conclusion that "a cause of action for negligent infliction of emotional distress did not lie . . . because McGarry's life had not been put in peril by an external force nor had she witnessed an accident or event putting the life of a close friend or loved one in peril . . ." *Id.* at ¶53. The Second District relied on the fact that the doctor had not caused the cancer and the alleged misdiagnosis was not an "external force" capable of serving as the basis of a claim for negligent infliction of emotional distress. *Id.* The trial court in this case relied on *McGarry* for its conclusion that Dr. Patterson and his employer were entitled to judgment as a matter of law on Ms. Loudin's negligent infliction of emotional distress claim because Dr. Patterson's alleged negligence was not the external force that had caused the cancer.

{¶37} Negligent infliction of emotional distress, however, was not the focus of the *McGarry* decision. The court in *McGarry* devoted just one of the eighty-two paragraphs of its opinion to the analysis of the plaintiff's negligent infliction of emotional distress claim. In that paragraph, the court cited only one case, *Heiner v. Moretuzzo*, 73 Ohio St. 3d 80 (1995).

McGarry v. Horlacher, M.D., 149 Ohio App. 3d 33, 2002-Ohio-3161, at ¶53. It cited *Heiner* for the proposition that the Ohio Supreme Court had only recognized negligent infliction of emotional distress claims in situations in which the plaintiff's life had been "put in peril by an external force" or the plaintiff had "witnessed an accident or event putting the life of a close friend or loved one in peril." *Id.* But *Heiner* did not use the term "external force." *Id.*; see *Heiner v. Moretuzzo*, 73 Ohio St. 3d 80 (1995). The *McGarry* decision seems to imply that negligent infliction of emotional distress claims should be reserved for cases of trauma, like automobile collisions. This Court is not aware of any Ohio Supreme Court authority for that proposition. If the Ohio Supreme Court had intended to so limit negligent infliction of emotional distress claims, it could have held in *Heiner* and *Dobran* that such claims cannot be maintained outside of automobile collisions or, at least, that they cannot be maintained in medical malpractice cases.

{¶38} As discussed above, in both *Heiner* and *Dobran*, the Supreme Court focused on the fact that Ohio does not recognize a claim for negligent infliction of emotional distress based on a plaintiff's fear of a non-existent peril. *Heiner v. Moretuzzo*, 73 Ohio St. 3d 80, syllabus (1995); *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 2004-Ohio-1883, at ¶13, 18. Such a claim requires an "actual threat of physical harm." *Heiner*, 73 Ohio St. 3d at 82. The plaintiff in *Heiner* was not negligently exposed to HIV and distressed because she may have contracted it. She was simply given a false positive on an HIV test. In both *Heiner* and *Dobran*, the doctor's alleged negligence did not in any way affect the plaintiff's disease process or put the plaintiff at risk of any actual physical peril. In *Heiner*, the Supreme Court reviewed other negligent infliction of emotional distress cases, noting that regardless of whether the plaintiffs were

bystanders or were directly affected by the negligent conduct, each case dealt with a real or impending physical calamity. *Id.* at 85.

{¶39} Unlike the false positive testing in *Heiner* and the mishandling of the tissue sample in *Dobran*, neither of which subjected anyone to any real threat of physical harm, in this case, Ms. Loudin presented evidence that Dr. Patterson's alleged negligence subjected her to a 13-month delay in treating breast cancer. According to her expert oncologist, during the delay, the cancer doubled in size and metastasized to her lymph nodes, exposing her to an increased risk of recurrence and death. Ms. Loudin presented evidence that the enhanced risk of recurrence caused her to suffer serious emotional distress distinct from what she felt at her initial diagnosis of cancer.

{¶40} This Court does not agree with the trial court's determination that, because the defendants did not cause Ms. Loudin's cancer, there is no genuine issue of material fact regarding whether their alleged negligence proximately caused her any psychological injury. Ms. Loudin has not claimed that Dr. Patterson caused her cancer. She has essentially claimed that his negligence proximately caused an aggravation of her pre-existing condition. According to Ms. Loudin's evidence, but for Dr. Patterson's negligence, her cancer would not have doubled in size and spread to her lymph nodes, increasing her risk of recurrence and death. It is that increased risk, allegedly attributable to Dr. Patterson, that she claims has caused her serious emotional distress.

{¶41} The Ohio Supreme Court has said that "Ohio courts have limited recovery for negligent infliction of emotional distress to such instances as where one was a bystander to an accident or was in fear of physical consequences to his own person." *Hugh v. Howard*, 64 Ohio St. 3d 82, 85-86 (1992), overruled on other grounds by *Gallimore v. Children's Hosp. Med. Ctr.*,

67 Ohio St. 3d 244 (1993), (citing *Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983); *Criswell v. Brentwood Hosp.*, 49 Ohio App. 3d 163 (1989)). In this case, Ms. Loudin has presented evidence tending to prove that the defendants' negligence exposed her to an enhanced risk of a recurrence of cancer. Based on the facts of this case, Ms. Loudin falls within the class of plaintiffs who can pursue a claim for negligent infliction of emotional distress because she is "in fear of physical consequences to [her] own person." *Id.* at 85-86.

{¶42} Viewing the evidence in the light most favorable to Ms. Loudin, a jury could reasonably find that, but for Dr. Patterson's negligent reading of the 2003 mammogram, Ms. Loudin would not have had such a large tumor, the cancer would not have spread to her lymph nodes, and, therefore, she would not suffer from the emotional distress caused by her fear that she may be a victim of that increased risk of recurrence. Ms. Loudin has presented evidence creating a genuine issue of material fact regarding whether Dr. Patterson breached his duty to her and whether his breach caused her any harm. It is for a jury to determine the credibility of the testimony and, if it finds it credible, assign a dollar amount to the injury.

{¶43} The trial court expressed some concern in this case that a jury would not be able to distinguish between the emotional distress Ms. Loudin experienced when she was first diagnosed with cancer and the increase in that distress that she claims is attributable to Dr. Patterson's negligence. The emotional distress Ms. Loudin originally experienced at being diagnosed with cancer is not compensable in this case, making the jury's task more difficult. Juries, however, are often asked to make difficult decisions on everything from which expert is more authoritative regarding a complicated scientific principle to what percentage of negligence is attributable to each party in a contributory negligence case. There is no reason to believe a jury could not engage in the same complicated discussions to assign a value to Ms. Loudin's

emotional distress. To the extent that it addressed the negligent infliction of emotional distress claim, Ms. Loudin's first assignment of error is sustained.

MEDICAL MALPRACTICE

{¶44} Ms. Loudin has argued that the trial court incorrectly granted Dr. Patterson's motion for summary judgment on her medical malpractice claim. Specifically, she has argued that she presented evidence that created a genuine issue of material fact regarding whether Dr. Patterson deviated from the acceptable standard of care and whether that alleged deviation proximately caused her injuries, including the unchecked growth of the malignant tumor and the cancer's invasion into her lymph nodes during the delay. The trial court granted the motion for summary judgment on the medical malpractice claim because "[Ms. Loudin] has failed to put forth evidence of any injury which was proximately caused by Defendants." The trial court agreed with Dr. Patterson's position that "growth and metastasis of cancer are not compensable physical injuries in Ohio."

{¶45} In order to establish a medical malpractice claim in Ohio, a plaintiff must offer proof of four elements: (1) the existence of a duty owed to the plaintiff by the defendant; (2) a breach of the defendant's duty; (3) causation based on probability; and (4) damages. *Stinson v. England*, 69 Ohio St. 3d 451, 455 (1994). In this case, there was conflicting evidence regarding whether Dr. Patterson met the standard of care in reading Ms. Loudin's 2003 mammogram. Based on the evidence, reasonable minds could conclude that Dr. Patterson deviated from the standard of care and thereby caused a delay of 13 months in the diagnosis of Ms. Loudin's breast cancer.

{¶46} The focus of the disagreement on appeal is whether Ms. Loudin has presented evidence based on which reasonable minds could conclude that Dr. Patterson's alleged delay in

diagnosis proximately caused her any harm. There was conflicting evidence regarding whether, if the cancer had been diagnosed at the time of the 2003 mammogram, it would have been a smaller, localized, Stage I cancer that would have been less likely to recur. Viewing the evidence in the light most favorable to Ms. Loudin, reasonable minds could conclude that, had the cancer been diagnosed in 2003, it would not have doubled in size, metastasized to the lymph nodes, and increased to Stage IIA, decreasing Ms. Loudin's chance of survival.

{¶47} This Court does not agree with the trial court's pronouncement that growth and metastasis of cancer are not compensable injuries in Ohio. The trial court did not offer any authority for that proposition. It merely concluded that "the growth and metastasis of the cancer did not cause Plaintiff any other physical injuries as evidenced by her current state of health."

{¶48} This Court is not prepared to say that the growth and metastasis of cancer, if caused by a doctor's negligence, is a wrong that is simply not deserving of a legal remedy. See *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 2004-Ohio-1883, at ¶19 (quoting *Heiner v. Moretuzzo*, 73 Ohio St. 3d 80, 88 (1995)). The growth and metastasis of cancer constitute physical harm that is a compensable physical injury if it is causally related to a breach of duty owed to the injured party. Viewing the evidence in the light most favorable to Ms. Loudin, reasonable minds could conclude that the 13-month delay in diagnosis was the proximate cause of the growth and metastasis of her breast cancer. If a jury determines that Dr. Patterson is liable for that injury, it can assign a dollar amount to the harm. To the extent that Ms. Loudin's first assignment of error addressed her medical malpractice claim, it is sustained.

OBJECTIONS TO EXPERT TESTIMONY

{¶49} Ms. Loudin's second assignment of error is that the trial court incorrectly sustained her opponents' objections to the testimony of her expert radiologist, Jules Sumkin,

D.O. The trial court ruled that the videotaped deposition should be edited to exclude certain testimony on the basis that Ms. Loudin's lawyer had asked leading questions on redirect examination.

{¶50} Ms. Loudin has cited *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 190 (1993), for the proposition that it is permissible to use leading questions to direct a witness's attention to events or topics about which the witness has already testified. In this case, however, Ms. Loudin's lawyer didn't simply direct Dr. Sumkin's attention to a certain topic before asking non-leading substantive questions about that topic. Ms. Loudin's lawyer attempted to summarize Dr. Sumkin's earlier testimony and have him agree with the summary. Although a trial court has discretion to allow a lawyer to ask leading questions during direct examination in various situations, it also has discretion to prohibit it. Evid. R. 611(A),(C); Staff Notes to Evid. R. 611(C). Ms. Loudin has cited various decisions of the Ohio Supreme Court for the proposition that "[a] trial court has latitude to exercise sound discretion in determining whether to allow leading questions on direct examination." See, e.g., *State v. Smith*, 80 Ohio St. 3d 89, 110-11 (1997). In this case, the trial court properly exercised its discretion to refuse to allow various leading questions during redirect examination. Ms. Loudin's second assignment of error is overruled.

CONCLUSION

{¶51} Ms. Loudin's first assignment of error is sustained because there are genuine issues of material fact remaining for trial on both the negligent infliction of emotional distress claim and the claim for medical malpractice. As this Court has determined that the trial court incorrectly granted Dr. Patterson and his employer summary judgment on the medical malpractice claim, the grant of summary judgment on the negligent supervision and respondeat

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superior claims are also reversed. This Court affirms the trial court's decision regarding the objections to Dr. Sumkin's testimony. The judgment of the Summit County Common Pleas Court is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally.


CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY

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APPEARANCES:

LAWRENCE J. SCANLON, and MICHAEL J. ELLIOTT, attorneys at law, for appellant.

DOUGLAS G. LEAK, attorney at law, for appellees.

STACY A. RAGON, attorney at law, for appellees.

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STATE OF OHIO) COURT OF APPEALS THE COURT OF APPEALS
) ss: DANIEL M. HERRIGAN NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT)
2010 FEB -4 PM 1:30

LONNA LOUDIN, SUMMIT COUNTY C.A. No. 24783
CLERK OF COURTS

Appellant

v.

RADIOLOGY & IMAGING
SERVICES, INC., ET AL.,

Appellees

JOURNAL ENTRY

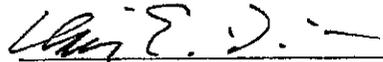
Richard Patterson, M.D. and Radiology & Imaging Services Inc. have moved this Court to certify a conflict between its judgment in this case and the judgment of the Second District Court of Appeals in *McGarry v. Horlacher*, 149 Ohio App. 3d 33, 2002-Ohio-3161. This Court declines to do so because the cited case does not present a conflict on the rule of law suggested by Dr. Patterson and Radiology & Imaging Services.

Article IV Section 3(B)(4) of the Ohio Constitution provides that, whenever the judges of a court of appeals determine that a judgment upon which they have agreed conflicts with a judgment of another court of appeals, they shall certify that conflict to the Ohio Supreme Court. In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993), the Ohio Supreme Court held that, for certification under Article IV Section 3(B)(4) to be appropriate, three conditions must be satisfied:

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First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Dr. Patterson and Radiology & Imaging have argued that this Court's decision conflicts with the Second District's decision in *McGarry* regarding: "[w]hether a plaintiff can recover for negligent infliction of emotional distress claim in an alleged delay of diagnosis case where the plaintiff cannot prove that either the treatment or prognosis was any different as a result of the alleged delay in diagnosis." The issue the defendants have proposed for certification does not represent a conflict between the two cited cases. Ms. Loudin presented expert testimony specifically quantifying the adverse effect that the alleged delay in diagnosis had on her prognosis. The motion to certify conflict is denied.


Clair E. Dickinson, Presiding Judge

Concurs:
Belfance, J.

Dissents:
Carr, J.